

SREVICE DATE – FEBRUARY 1, 2006

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34549

ILLINOIS RAILNET, INC.—ACQUISITION AND OPERATION EXEMPTION—  
BNSF RAILWAY COMPANY<sup>1</sup>

Decided: January 30, 2006

This decision denies a petition by the United Transportation Union (UTU) to revoke the exemption in this proceeding.

BACKGROUND

By verified notice filed on September 27, 2004, and served and published in the Federal Register on October 18, 2004 (69 FR 61434), Illinois RailNet, Inc. (RailNet), a Class III rail carrier, invoked the class exemption at 49 CFR 1150.41 to obtain authority pursuant to 49 U.S.C. 10502 to acquire from BNSF Railway Company (BNSF) and to operate two lines of railroad, totaling 24.7 miles, as follows: (1) a portion of BNSF's Oregon Subdivision between milepost 98.75 at Oregon, IL, and milepost 105.78 at Mt. Morris, IL, and (2) a portion of BNSF's La Salle Subdivision between milepost 25.7 at La Salle, IL, and milepost 43.36 at Zearing, IL, in Ogle, La Salle, and Bureau Counties (collectively, the Lines). The exemption authority became effective on October 4, 2004. RailNet stated that it expected to consummate the transaction on October 8, 2004.

This transaction is related to STB Finance Docket No. 34559, Illinois RailNet, Inc.—Trackage Rights Exemption—The Burlington Northern and Santa Fe Railway Company, wherein RailNet obtained authority to acquire from BNSF: (1) limited local trackage rights for the purpose of serving customers located on BNSF track in and around Oregon, IL, and (2) limited overhead trackage rights for the purpose of interchanging traffic with BNSF and accommodating “light power”—locomotives that are not pulling any cars—moving over BNSF's lines between milepost 98.49 near Oregon, IL, and milepost 86.57 near Flag Center, IL, and between milepost 43.36 near Zearing and milepost 40.73 near Montgomery, IL.

On January 26, 2005, UTU filed a petition to revoke the exemption in this proceeding and served discovery requests upon RailNet pursuant to 49 CFR 1121. On February 10, 2005, RailNet filed a reply in opposition to the petition. On March 9, 2005, UTU filed a motion to compel RailNet to produce an unredacted version of the RailNet-BNSF Agreement for Sale (the

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<sup>1</sup> Effective January 20, 2005, The Burlington Northern and Santa Fe Railway Company changed its name to BNSF Railway Company.

agreement), which the Board granted in a decision served April 15, 2005. Following discovery, UTU filed a supplemental petition to revoke under seal on May 3, 2005.<sup>2</sup> RailNet filed a reply on May 23, 2005.

## POSITIONS OF THE PARTIES

In its petition, UTU argues that this exemption should be revoked under the standards of 49 U.S.C. 10502(d) because application of regulation under 49 U.S.C. 10902 and 11323-25 is necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. 10101. UTU asserts that the Board must ensure that the transaction serves the public convenience and necessity (PC&N), and petitioner maintains that it is impossible to ascertain from the Board's minimal exemption-filing requirements whether this transaction was conducted at arm's length and whether it carries out the RTP, particularly 49 U.S.C. 10101(11), encouraging fair employee wages and safe and suitable working conditions. UTU also asserts that RailNet provides service to two sand plants near Oregon, IL, without any authority from the Board, and that, if RailNet did obtain authority via trackage rights, the trackage should be identified by specific milepost numbers.

In its supplemental petition, UTU challenges the bona fides of the transaction, contending that it serves no legitimate business goals and is merely a device intended to move a number of jobs out from under a collective bargaining agreement (CBA) onto a nonunion carrier. Petitioner maintains that RailNet was created for this transaction and that, through the agreement, BNSF has maintained significant control over the operation of the track. UTU points to several features of the agreement that it characterizes as both unusual and as demonstrating BNSF's continuing control. In particular, UTU claims that BNSF sold these Lines for less than their franchise value and that RailNet must pay a fee to BNSF for every car it interchanges with a carrier other than BNSF.

In reply, RailNet argues that this is a "garden variety" transaction that is not a sham and was not entered into with the purpose of harming employees who are covered by a CBA. RailNet claims that the provisions UTU cites in the agreement are common in agreements between Class I railroads and their short line partners. RailNet adds that it is independent of BNSF and that BNSF has not retained significant control over operations on the Lines. RailNet notes that it is responsible for day-to-day operations and for any resulting profits/losses, and that it meets independently with existing customers and markets its services to new ones. Additionally, RailNet states that it was not created for this transaction, but was formed in 1997 to acquire other lines from BNSF. RailNet explains that there are valid commercial reasons underpinning this transaction, which will benefit both of the carriers and their customers. RailNet asserts that revocation is not justified here, as UTU has failed to show that the transaction is inconsistent with the PC&N or that regulation is necessary to carry out the RTP. Finally, RailNet states that it serves the two sand shippers near Oregon, IL, under the trackage

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<sup>2</sup> UTU subsequently filed a public version of the supplemental petition.

rights authority it obtained in STB Finance Docket No. 34559, and that it did not provide milepost designations because both RailNet and BNSF believed this track is more clearly identified by map.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10502(d), we may revoke an exemption if regulation is necessary to carry out the transportation policy of 49 U.S.C. 10101. To the extent a party wishes to challenge the bona fides of a transaction, we retain the right to review the transaction to protect the integrity of our processes. Minnesota Comm. Ry., Inc.—Trackage Exempt.—BN RR. Co., 8 I.C.C.2d 31 (1991). The party seeking revocation must express reasonable, specific concerns to demonstrate that revocation of the exemption is warranted. See I&M Rail Link LLC—Acquisition and Operation Exemption—Certain Lines of Soo Line Railroad Company d/b/a Canadian Pacific Railway, STB Finance Docket No. 33326 et al. (STB served Apr. 2, 1997), aff'd sub nom. City of Ottumwa v. STB, 153 F.3d 879 (8th Cir. 1998). Our review of the record here leads us to conclude that UTU has not justified the relief it seeks.

The evidence does not support UTU's challenge to the bona fides of this transaction. Rather, the circumstances surrounding the transaction indicate that it was motivated by a desire by BNSF and RailNet to realize legitimate business goals. On BNSF's part, sale of these Lines permits that carrier to concentrate its resources on heavier-used lines. On RailNet's part, it had conducted rail operations in this locale for several years over lines connected to these Lines and therefore, it was a logical entity to expand its operations by acquiring these Lines.

Contrary to UTU's allegations, RailNet was not created for this transaction. It has existed since 1997. See Illinois RailNet, Inc.—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, Inc., STB Finance Docket No. 33516 (STB served Dec. 30, 1997) and Illinois RailNet, Inc.—Acquisition and Operation Exemption—The Burlington Northern and Santa Fe Railway Company, STB Finance Docket No. 33706 (STB served Feb. 25, 1999). Moreover, RailNet is a financially independent business entity that is unaffiliated with BNSF. See Patrick D. Broe and BNS Holdings, Inc.—Acquisition of Control Exemption—Nebraska, Kansas & Colorado RailNet, Inc., Illinois RailNet, Inc., and Georgia and Florida RailNet, Inc., STB Finance Docket No. 34687 (STB served May 16, 2005). Several provisions of the agreement demonstrate RailNet's independence. RailNet acquired all of BNSF's interest in the real estate underlying, and the improvements on, the Lines, except for certain limited rights that do not pertain to rail service (such as nonexclusive easements for pipelines, etc.). Further, BNSF has no rights to operate over the Lines or to interfere with or direct RailNet's operations on the Lines. The provisions of this agreement are not unusual in contracts between Class I railroads and connecting short line railroads and are consistent with Board precedent. See Kaw River Railroad, Inc.—Acquisition and Operation Exemption—The Kansas City Southern Railway Company, STB Finance Docket No. 34509 (STB served May 3, 2005) (Kaw), appeal docketed sub nom. Brotherhood of Locomotive Engineers and Trainmen v. STB, No. 05-1233 (D.C. Cir. July 5, 2005); Central Illinois Railroad Company—Lease and

Operation Exemption—Lines of The Burlington Northern and Santa Fe Railway Company at Chicago, Cook County, IL, STB Finance Docket No. 33960 (STB served Sept. 12, 2002; and Portland & Western Railroad, Inc.—Lease and Operation Exemption—Lines of Burlington Northern Railroad Company, STB Finance Docket No. 32766 (STB served Oct. 15, 1997).

These facts distinguish this case from Burlington Northern R. Co. v. United Transp. Union, 862 F.2d 1266 (7th Cir. 1988), and Sagamore National Corporation—Acquisition and Operation Exemption—Lines of Indiana Hi-Rail Corporation, Finance Docket No. 32523 et al. (ICC served Oct. 28, 1994), in which transactions were disallowed because our predecessor, the Interstate Commerce Commission, concluded that new entities were created for the sole purpose of transferring jobs to a non-union railroad that nevertheless was still controlled by the original, unionized rail carrier. Having reviewed the agreement submitted and the circumstances surrounding the sale, we conclude that UTU has failed to demonstrate that the sale is a sham, or a device created merely to move jobs to a nonunion carrier.

While we have some concerns about the terms of the agreement that provide for a per-car fee when cars are interchanged with a carrier other than the seller, none of the shippers affected by the transaction have opposed the sale and we believe that it would be better to address questions about such language more broadly, and with the benefit of public comment, in STB Ex Parte No. 575, Review of Rail Access and Competition Issues—Renewed Petition of the Western Coal Traffic League. To that end, we are, concurrently with the issuance of this decision, seeking further comments in STB Ex Parte No. 575 on the renewed petition by the Western Coal Traffic League for a rulemaking to eliminate unreasonable “paper barriers” to interchange.

Additionally, we see no need to revoke RailNet’s exemption as inconsistent with the PC&N. To obtain a revocation, the petitioner must demonstrate that greater regulatory scrutiny is necessary to carry out the RTP. UTU asserts that it is impossible to ascertain from the Board’s exemption requirements whether this transaction carries out the RTP provision encouraging fair employee wages and safe and suitable working conditions. Petitioner is concerned that work previously done by BNSF employees, some of whom are represented by UTU, will now be done by non-union RailNet employees. But we see no basis for finding that the labor impacts are so severe as to warrant greater regulatory scrutiny for the transaction through a more formal process, as opposed to allowing it to proceed under the class exemption procedures. The statute makes clear that labor protections cannot be imposed in a proceeding initiated by a Class III railroad under section 10902. See 49 U.S.C. 10902(d). And UTU has failed to show that the labor impact here is different in character from, or greater in degree than, the impacts typically associated with the acquisition of track by a short line carrier. Indeed, petitioner has not even identified any BNSF employees who have suffered hardship from this transaction. Nor has UTU rebutted the presumption reflected in the class exemption that such acquisitions do not warrant detailed Board scrutiny to carry out the RTP. See, e.g., Kaw. Accordingly, we find no basis to revoke RailNet’s exemption.

Finally, UTU's argument that RailNet has been providing service to two sand plants near Oregon, IL, without obtaining authority from the Board likewise lacks merit. Petitioner asserts that, if RailNet intended to obtain authority to serve these shippers via the trackage rights it sought in STB Finance Docket No. 34559, then RailNet should be required to specify the milepost numbers instead of simply stating the name of a city and the trackage therein. However, while milepost designations are often included in trackage rights filings, our rules do not require specific milepost designations. Pursuant to 49 CFR 1180.6(a)(5)-(6), a railroad seeking to qualify for a notice of exemption for the acquisition of trackage rights under section 1180.2(d)(7) must submit: (1) a list of the State(s) in which any part of the property of each applicant carrier is situated, and (2) a map indicating clearly the line(s) of applicant carriers in their true relations to each other, short line connections, other rail lines in the territory, and the principal geographic points in the region traversed. RailNet submitted this information with its notice. We find that the information was sufficient to satisfy our rules and to identify the lines involved.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. UTU's petition to revoke RailNet's exemption is denied.
2. This decision is effective on its date of service.

By the Board, Chairman Buttrey and Vice Chairman Mulvey.

Vernon A. Williams  
Secretary